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August 12, 2005

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VIA HAND DELIVERY

Hon. Ron Jones, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*  
Docket No. 04-00186

Dear Chairman Jones:

Enclosed are the original and fourteen copies of BellSouth's *Response in Opposition to Covad's Motion for Reconsideration*. Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*

Docket No. 04-00186

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE**  
**IN OPPOSITION TO COVAD'S MOTION FOR RECONSIDERATION**

**INTRODUCTION**

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby responds to the motion for reconsideration filed by DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") of the Authority's July 20, 2005, decision. The Authority correctly and appropriately answered the question before it by finding that BellSouth is obligated to make line sharing available to Covad pursuant to the FCC's transition plan alone.

Covad bases its motion for reconsideration on its apparent dissatisfaction with the Authority's analysis of Section 271. Covad concedes, however, that the Section 271 question was "briefed by both sides." (Motion, p. 2). Indeed, Covad cannot argue otherwise since the Authority's Order summarized the parties' positions, including their respective Section 271 arguments at page 2, and elected to decline from imposing upon BellSouth any Section 271 line sharing obligation.<sup>1</sup>

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<sup>1</sup> At page 7 of the Order, the Authority recognized that the FCC "will provide clarification" at some point about a state commission's role concerning Section 271. CompSouth, an organization that includes Covad as one of its members, also anticipates FCC action. See Joint CLECs' July 1, 2005, Response to BellSouth's Motion for Summary Judgment filed in Docket No. 04-000381, p.

Nothing more is due Covad, and despite its dissatisfaction with the Authority's Order, there is no law that BellSouth is aware of that requires the Authority to address the issues presented by the parties in any particular manner. Having been presented with the arguments of the parties, the Authority was well within its rights to issue its Order in the manner it saw fit and Covad's Motion must be denied.

### **DISCUSSION**

BellSouth, Covad, and other parties, have filed a plethora of papers that address both line sharing and Section 271.<sup>2</sup> Indeed, Covad's Motion for Reconsideration reargues the same points that have been made before, and raises no new caselaw or legal authority that has not already been addressed. Instead, Covad launches into its argument with a blatant acknowledgement of its prior pleadings: "[i]n its September 3, 2004, Covad stated its position on the line sharing issues as follows ..." (Covad's Motion, p. 4). The remainder of Covad's argument is repetitive, and provides no reason for the Authority to revisit its decision and reverse course. Rather than burdening the record by repeating its prior papers, BellSouth will briefly highlight below the primary issues and incorporate by reference its pleadings from both this docket and Docket No. 04-00381.

Covad stubbornly insists that line sharing is a Section 271 checklist item four obligation. BellSouth disagrees. BellSouth meets its checklist item 4

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21 ("[t]he FCC will likely speak again about the rates, terms and conditions applicable to § 271 checklist items").

<sup>2</sup> See BellSouth's June 1, 2005 Motion for Summary Judgment; Joint CLECs' July 1, 2005, Response to BellSouth's Motion for Summary Judgment, and BellSouth's July 14, 2005 Reply Brief on Motion for Summary Judgment, all of which were filed in Docket No. 04-000381.

obligation by offering access to a complete loop, and is not obligated to provide Covad with just a portion of a loop. Checklist item 4 requires a loop – nothing more, nothing less. Covad’s vehemence that an assortment of FCC orders containing similar formatting can somehow transform organizational structure into statutory obligation fails.<sup>3</sup> The reality is that line sharing was created as a UNE by the FCC in 1999<sup>4</sup> – a UNE that was not able to withstand legal scrutiny,<sup>5</sup> and a UNE that the FCC has found to be anticompetitive and contrary to the goals of the 1996 Act.<sup>6</sup> The FCC has chosen to correct its error by enacting a transitional mechanism to wean Covad and the handful of carriers that use line sharing to some other serving arrangement. Covad cannot blind itself to the law simply because it has chosen a business strategy that focuses on a portion of the revenues available from a loop;<sup>7</sup> if Covad desires to pursue such a strategy it must pay the full loop cost just as other carriers do.

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<sup>3</sup> Covad has never satisfactorily explained why line sharing was not required for either Verizon or SBC to become authorized to provide long distance service in New York and Texas which could not have occurred if it was actually a Section 271 statutory obligation

<sup>4</sup> Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 20912 (“Line Sharing Order”), vacated and remanded, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“USTA I”), cert. denied, 538 U.S. 940 (2003).

<sup>5</sup> See *USTA I*, 290 F.3d at 428-430.

<sup>6</sup> TRO, ¶ 261 (“rules requiring line sharing may skew competitive LECs’ incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs’ and the competitive LECs’ offerings. We find that such results would run counter to the statute’s express goal of encouraging competition and innovation in all telecommunications markets”).

<sup>7</sup> TRO, ¶ 258 (“we disagree with the Commission’s prior finding that competitive LECs are impaired without unbundled access to the HFPL because purchasing a stand-alone loop would be too costly for carriers seeking to offer a broadband service. Whereas in the Line Sharing Order, the focus was only on the revenues derived from an individual service, our focus is on the all potential

BellSouth has also explained, as an alternative argument, that if there was any Section 271 line sharing requirement (there is not), the FCC has removed any such obligation.<sup>8</sup> Despite the fact that Covad believes Commissioner Martin made a "manifestly incorrect" pronouncement about line sharing prior to his elevation to FCC Chairman (Motion, p. 8), there can be no dispute that Chairman Martin explained that the FCC's *Broadband 271 Forbearance Order* "forbears from any Section 271 obligation with respect to line sharing."<sup>9</sup> And, although Covad claims that the FCC issued a "follow-on" order a week after its *Broadband 271 Forbearance Order* that does not list line sharing as a broadband element for which forbearance was granted, Covad failed to address the FCC's March 2005 *DSL Preemption Order*<sup>10</sup>, in which the FCC very clearly reiterated that line sharing was required *only* under an express three-year phase out plan. In other words, Covad's motion seeks to draw the Authority down a road that would place it squarely at odds with Chairman Martin.

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revenues derived from using the full functionality of the loop. As stated above, the impairment standard we adopt today considers whether all potential revenues from entering a market exceed the costs of entry, taking into account consideration of any advantages a new entrant may have. Thus, in the instant case, we take into the account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services. In so doing, we conclude that the increased operational and economic costs of a stand-alone loop (including costs associated with the development of marketing, billing, and customer care infrastructure) are offset by the increased revenue opportunities afforded by the whole loop.")

<sup>8</sup> *Memorandum Opinion and Order*, WC Docket Nos. 01-338, 03-235, 03-260, and 04-48 released October 27, 2004 ("*Broadband 271 Forbearance Order*")

<sup>9</sup> Although Covad maintains that Chairman Martin's statement proves line sharing is a Section 271 obligation, that argument fails because Chairman Martin used the word any.

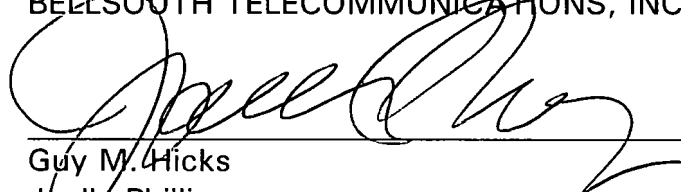
<sup>10</sup> *Memorandum Opinion and Order and Notice of Inquiry*, WC Docket No. 03-251 (Mar. 25, 2005).

BellSouth has also explained – at length – that the Authority is without authority to decide Section 271 implementation issues.<sup>11</sup> Rather than reiterating these arguments, which BellSouth also incorporates by reference and which were recently highlighted in oral argument, the Authority may find instructive a recent ruling from another state commission on this point. Specifically, on July 28, 2005, the Rhode Island Commission issued its Report and Order (“Order”) in Docket No. 3662 in which, when addressing the Section 271 issue, it stated “[a]t this time, it is apparent to the Commission that at the bistro serving up the BOCs’ wholesale obligations, the kitchen door numbered 271 is for ‘federal employees only.’” *Order*, pp. 9-10.<sup>12</sup>

The Authority, having been fully apprised of both parties’ arguments, correctly determined that BellSouth’s line sharing obligation is limited to the terms of the FCC’s transition plan. Covad is entitled to nothing more, and its Motion for Reconsideration should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

Guy M. Hicks

Joelle Phillips

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<sup>11</sup> See BellSouth’s June 1, 2005 Motion for Summary Judgment and BellSouth’s July 14, 2005 Reply Brief on Motion for Summary Judgment filed in Docket No. 04-000381.

<sup>12</sup> Although Covad stresses decisions in which a few state commissions have elected to regulate Section 271 issues, the majority of state commissions have not exerted authority over Section 271 to date, which is consistent with federal court pronouncements concerning exclusive FCC authority over Section 271.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2005, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
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